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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GARY PAUDLER,

Plaintiff and Appellant,

v.

M&T BANK,

Defendant and Respondent.

2d Civil No. B287400
(Super. Ct. No. 15CV01140)
(Santa Barbara County)

Gary Paudler appeals from a judgment entered in favor of respondent M&T Bank, which serviced his home loan. As to matters tried by the jury, appellant claims that the evidence is insufficient to support a finding that he failed to comply with a forbearance agreement designed to avoid foreclosure. As to matters tried by the court, appellant claims that the court improperly prepared its statement of decision and erroneously concluded that respondent had not violated the Homeowner Bill of Rights. We affirm.

Factual and Procedural Background

In September 2011 appellant and his wife, Barbara L. Gundy (wife), signed a promissory note for a home loan of $737,047. The loan was secured by a deed of trust on their home.

Appellant and wife fell behind in making their loan payments. The monthly payment obligation was $4,657.40. In April 2013 Bank of America, N.A. (BANA), which was then servicing the loan, informed them that they were in default and that the property "will be referred to foreclosure."

Effective August 2, 2013, the servicing of the loan was assigned to respondent. On August 15, 2013, appellant and wife signed a document entitled "Special Forbearance Agreement." The agreement had been prepared by BANA. The first sentence of the agreement provided, "This Special Forbearance Agreement . . . states the terms and conditions upon which you agree to pay your *delinquent* . . . loan . . . during a forbearance period." (Italics added.) The agreement noted that appellant and wife had missed five monthly payments and that the amount past due on the loan was $23,287. The agreement established a "Forbearance Plan Payment Schedule" whereby appellant and wife would pay the delinquent amount in 12 monthly installments of approximately $1,940 from September 1, 2013 through August 1, 2014. At the end of the forbearance period, they would "resume the regular monthly payments required under [their] note and security instrument."

The forbearance agreement stated that it "does not modify the terms of the note and security agreement you originally signed in connection with the loan." "After the end of the forbearance period, your Loan will be reported as delinquent if your Loan is not completely current under your Loan documents."

During the 12-month forbearance period, appellant and wife paid only $1,940 per month pursuant to the forbearance agreement. They did not make the regular monthly payment of $4,657.40 pursuant to the promissory note. Thus, for the 12-month forbearance period they owed $55,888.80 ($4,657.40 x 12 = $55,888,80). At the end of the forbearance period in August 2014, appellant and wife received a notice from respondent stating, "Your mortgage payments of $55,888.80 plus late charges and other fees of $1,148.04 for the months of September 1, 2013 through today are past due. If these payments are not received by August 23, 2014, you could lose your home."

In September 2014 respondent denied appellant and wife's "request for a loss mitigation option that would allow [them] to retain ownership of [their] home." In December 2014 the trustee under the deed of trust recorded a "notice of default and election to sell under deed of trust" (NOD). The NOD said that, as of December 24, 2014, the amount due on the promissory note had increased to $76,930.66. In March 2015 respondent again denied appellant and wife's "request for a loss mitigation option."

In May 2015 appellant filed a complaint against respondent. The operative complaint is the second amended complaint filed in October 2015. It alleged 10 causes of action, but appellant proceeded to trial on six causes of action. A jury trial was conducted on four causes of action: breach of contract, i.e., the forbearance agreement; breach of the forbearance agreement's implied covenant of good faith and fair dealing; negligence in servicing appellant's loan; and promissory estoppel. In May 2017 the jury returned a special verdict finding that appellant did not "do all or substantially all, of the significant things that the Special Forbearance Agreement required him to

do" and that he was not "excused" from doing these things. The jury also found that respondent had not been negligent in servicing appellant's loan and that it had not breached a promise made to appellant.

The two remaining causes of action were tried by the court. They alleged violations by respondent of the Homeowner Bill of Rights (HBOR; Civ. Code, §§ 2923.4 et seq.) and California's Unfair Competition Law (UCL; Bus. & Prof. Code, §17200 et seq.). In a statement of decision filed in July 2017, the trial court found no violation of HBOR. It also found that appellant had failed to show that respondent had "engaged in 'unlawful,' [']unfair' o[r] 'fraudulent' business acts or practices" that could "be a basis for a UCL claim."

The court noted that appellant's "property has not been sold and there is no pending danger that it will be [sold]." In his opening brief, appellant states that "the trustee sale is still pending."

Statement of Decision

Appellant contends, "The trial court improperly abrogated [*sic*] its authority to [respondent] by signing [respondent's] proposed Statement of Decision without making any substantive changes . . . ." The point is forfeited because appellant cites no authority prohibiting a trial court from accepting a party's proposed statement of decision without making such changes. "It is the responsibility of the appellant . . . to support claims of error with meaningful argument and citation to authority. [Citations.] When legal argument with citation to authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations]." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

Alleged Violations of HBOR

As to his HBOR claim, appellant maintains that respondent violated Civil Code section 2923.55, which specifies the steps a mortgage servicer must take before recording an NOD. In view of respondent's violations, appellant asserts that the trial court was "require[d] to rescind the improperly recorded notice of default" recorded in December 2014. (Bold, underlining, and capitalization omitted.) "The trial court should have ordered an injunction against [respondent's] proceeding with the pending trustee sale of [appellant's] home based on the existing [NOD, i.e., the one recorded in December 2014] until [respondent] had complied with HBOR." "[T]he foreclosure sale should be enjoined pending compliance with Civil Code § 2923.55 and the issuance of another Notice of Default after such compliance."

Respondent argues that the point is moot. It relies on two documents recorded after the notice of appeal was filed. These documents are not included in the record on appeal. The first was recorded on December 27, 2017, in the official records of Santa Barbara County. It rescinds the NOD recorded in December 2014. The second document is a new NOD recorded on January 24, 2018. It states that, as of January 22, 2018, the amount past due is $240,450.62. One year later, on January 28, 2019, respondent filed in this court a request seeking judicial notice of both documents.

Appellant waited until his reply brief, filed on March 21, 2019, to oppose the request. He was required to serve and file any opposition within 15 days after the request was filed. (Cal. Rules of Court, rule 8.54(a)(3).) In his reply brief appellant claims in confusing language that his "attorneys were never served with a copy of the request for judicial notice, until after

inquiring into its service upon learning when this Court granted the request due to [appellant's] failure to respond." Respondent's request for judicial notice includes a proof of service showing that appellant was served by mail on January 28, 2019. Prior to the filing of this opinion, we did not grant respondent's request for judicial notice.

Because of appellant's failure to timely file opposition to the request, he may be deemed to have consented to the granting of the request. (Cal. Rules of Court, rule 8.54(c); see *Sharp v. Union Pacific R.R. Co.* (1992) 8 Cal.App.4th 357, 360-361; *Giles v. Horn* (2002) 100 Cal.App.4th 206, 228.) Nevertheless, we consider appellant's opposing arguments on their merits.

Appellant contends, "Because this Court should only consider matters which were part of the record at the time of the judgment or subject to judicial notice [at that time], it should not consider [respondent's December 27, 2017] rescission documents." We disagree. "It is well settled that an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed. We will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal. [Citation.]" (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1557.)

Appellant alleges, "Although the existence of these documents may have been judicially noticeable, the truth of statements contained in these documents and their proper interpretation are not subject to judicial notice." But respondent has not requested that these documents be judicially noticed to prove the truth of any matter asserted therein. The documents are offered to prove their existence and recordation.

Thus, pursuant to Evidence Code sections 459 and 452, subdivision (h), we grant respondent's request for judicial notice. The December 2017 rescission of the December 2014 NOD renders moot appellant's claim that, because respondent violated Civil Code section 2923.55, the trial court was "require[d] to rescind" the December 2014 NOD. It also renders moot his claim that, because of these violations, the foreclosure sale based on the December 2014 NOD should be enjoined. As a matter of law, the foreclosure sale could not proceed after the NOD was rescinded. A future foreclosure sale would have to be based on the January 2018 NOD.

Appellant asserts that the January 2018 NOD "violated the same provisions of the HBOR as the 2014 [NOD]." The validity of the January 2018 NOD is not properly before us in the present appeal.

Jury Verdict

As to the breach of contract claim, appellant maintains: "The Jury incorrectly concluded that [he] did not do all, or substantially all, of the significant and material things that the [forbearance agreement] required him to do, or that he was not excused from doing." "At no time during the special forbearance period did [he] fail to . . . comply with any of his obligations under the Agreement. . . . [He] completed all of his forbearance payments, on time and in full. . . . There was no reference in the [forbearance agreement] to paying any payment other than those made by [him] as outlined in the [agreement]."

The standard of review is substantial evidence. ""'When a trial court's factual determination is attacked on the ground that [the evidence is insufficient] to sustain it, the power of an appellate court *begins* and *ends* with the determination as to

whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. . . ."'" (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489.)

"A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable. [Citation.] Contrary to fundamental principles of appellate review, [appellant] has failed to do so. Instead, his opening brief sets forth only his version of the evidence . . . ." (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) Appellant does not summarize the conflicting evidence presented by Shannon Ormond, respondent's "operations manager of the loss mitigation team, and assistant vice-president." Her testimony comprises approximately 190 pages of the reporter's transcript. Appellant erroneously alleges, "[T]he jury should have only considered the evidence which showed that [he] performed all the terms of the [forbearance agreement]." "Because [appellant] has failed in his obligations concerning the discussion and analysis of a substantial evidence issue, we deem the issue waived. [Citation.]" (*Ibid*.)

In any event, substantial evidence supports the jury's finding that appellant did not comply with the requirements of the forbearance agreement. The agreement established a schedule for payment of the delinquent amount of $23,287. The agreement contemplated that, during the 12-month forbearance period, appellant and wife would keep current on the loan by making the regular monthly payment of $4,657.40 pursuant to

the promissory note. The agreement said that they "will be considered in default of this Agreement" if they "fail to comply with any other provision of the original note and security agreement executed in connection with the Loan, other than the prior failure to timely pay the Past Due Amounts that will be repaid by this Agreement." Appellant and wife defaulted under the forbearance agreement because during the forbearance period they failed to make regular payments pursuant to the promissory note. The agreement stated that it "does not modify the terms of the note and security agreement you originally signed in connection with the Loan."

Furthermore, the forbearance agreement provided that, at the end of the forbearance period, appellant and wife will "resume the regular monthly payments required under [their] note and security instrument." Shannon Ormond testified that appellant had not "made a mortgage payment . . . since the end of the special forbearance agreement."

Disposition

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

Trujillo & Winnick, Anthony W. Trujillo and Alexander H. Winnick for Plaintiff and Appellant.

Reed Smith, Kasey J. Curtis and Terry B. Bates for Defendant and Respondent.